

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

ALBERT ADRIAN MONTTOYA,

Petitioner,

v.

No. CV 14-0738 MV/GBW

JAMES JANECKA,

Respondent.

**MEMORANDUM OPINION AND ORDER**  
**DENYING REOPENING OF TIME TO FILE APPEAL**

This matter is before the Court on Petitioner's post-judgment Pro Se Motion for an Exercise of this Courts [sic] Discretionary Jurisdiction (Doc. 11) (the "motion") filed on February 26, 2015. In the motion, Petitioner asks the Court to "provide an exception to the . . . time rule to appeal to the United States Court of Appeals Tenth Circuit." For reasons set out below, the Court will deny the motion.


By order and judgment entered on August 29, 2014 (Docs. 6, 7), the Court dismissed Petitioner's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus for lack of jurisdiction as a second or successive petition. On February 26, 2015, Petitioner submitted his notice of appeal and the referenced motion to the Court of Appeals for the Tenth Circuit. The Court of Appeals forwarded the notice of appeal and the motion to this Court "so they can be properly filed" (Doc. 10). The Clerk entered the notice of appeal and the motion on the docket (Docs. 8, 11) and forwarded the notice and preliminary record to the Court of Appeals (Doc. 13).

In a subsequent order (Doc. 17), the Court of Appeals noted that 1) Petitioner's notice of appeal was not timely filed, 2) his motion "could be construed as an attempt to remedy the jurisdictional defect," and 3) "[t]he district court may reopen the time to file an appeal" (citing rule 4(a)(6) of the Federal Rules of Appellate Procedure). The Court of Appeals abated the appeal "pending the district court's construction and disposition of [Petitioner's motion]." The Court therefore construes Petitioner's motion as a motion under rule 4(a)(6) of the Federal Rules of Appellate Procedure to reopen the time to file an appeal.

Petitioner's motion does not satisfy the requirements of rule 4(a)(6). As the Court of Appeals for the Tenth Circuit has stated, "Rule 4(a)(6) permits the district court to 'reopen the time to file an appeal' if three conditions are satisfied." *Stringer v. Franklin*, 172 F. App'x 236, 237 (10th Cir. 2006) (quoting Fed. R. App. P. 4(a)(6)). The first condition in the rule is that "[t]he district court . . . find[] that the moving party did not receive notice . . . of the judgment or order sought to be appealed within 21 days after entry." Fed. R. App. P. 4(a)(6).

In the motion Petitioner does not deny that he received a copy of this Court's order and judgment of dismissal. He alleges, however, that he "thought that because the U.S. District Court had denied certificate of appealability that he was bar[r]ed from the U.S. Court of Appeals." (Mot. 47.) The rule contains no provision for an appellant-movant's mistake of law. *Cf. Clark v. Lavallie*, 204 F.3d 1038, 1040 (10th Cir. 2000) ("nothing within Rule 4(a)(6) indicates . . . that its limitations may be waived for equitable reasons."). Petitioner's motion, therefore, provides no grounds for a "find[ing] that [he] did not receive notice . . . of the entry of the judgment or order sought to be appealed within 21 days after entry." Fed. R. App. P. 4(a)(6)(A). Because the motion does not satisfy the first condition in rule 4(a)(6), the Court must deny the motion.

IT IS THEREFORE ORDERED that Petitioner's Pro Se Motion for an Exercise of this Courts [sic] Discretionary Jurisdiction (Doc. 11) filed on February 26, 2015, is CONSTRUED under rule 4(a)(6) of the Federal Rules of Appellate Procedure as a motion to reopen time to file an appeal and is DENIED.

  
UNITED STATES DISTRICT JUDGE